

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The ALJ's Order sets out findings of fact that are detailed, accurate, and supported by the record. It is not necessary to repeat those findings in this order and they are adopted as if specifically set forth herein.

Briefly summarized, claimant was employed by a temporary agency and sent to different job assignments. In July 2005, the claimant was assigned to IPX. Claimant's job was working on a line. She had to pick up bags loaded with medicine. While picking up a bag of medicine, she felt a pinch in her hand and then pain in her elbow. Claimant advised respondent of the injury and was provided medical treatment. She continued to work even though her upper extremity problem was worsening. Respondent placed the claimant on light-duty work for approximately three months and then assigned claimant to a job with an employer identified as Zupreem.<sup>1</sup>

Claimant testified:

Q. Can you tell the Court when you believe you suffered injury to the neck region?

A. I would say that I suffered that injury to my neck when I was working for Zupreem because the doctor had given me a restriction that I could not sweep, I couldn't lift up my arms very high, and I could not unload the boxes, and the man in charge still made me do all that. I had to pull the pallet down onto the floor and then put the boxes there. That's when I felt that my neck was injured.<sup>2</sup>

As a result of her first injury the claimant ultimately had surgery on her right shoulder by Dr. John N. Vani. After the surgery her shoulder pain improved but her neck pain persisted. Dr. Vani referred claimant for a cervical MRI and a consultation with Dr. Wesley E. Griffitt. Dr. Griffitt concluded the MRI revealed a right sided disk at C6-7 which correlated with claimant's radicular symptoms. Respondent referred claimant to Dr. Steven Hendler who concluded the MRI revealed a left sided disk at C6-7. Because his reading of the MRI as well as what he determined were minimal neck complaints in the medical records he concluded claimant's neck complaints were not work-related. But both Drs. Griffitt and Hendler recommended claimant receive treatment for her neck complaints.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>3</sup> "Burden of proof" means the burden of a party to persuade the trier of

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<sup>1</sup> As claimant was being treated for her arm and shoulder complaints a representative of respondent accompanied her and acted as an interpreter. Claimant testified that the representative incorrectly told the doctor that claimant said she was okay and she was then released to light duty and sent to the job at Zupreem.

<sup>2</sup> P.H. Trans. at 13.

<sup>3</sup> K.S.A. 2006 Supp. 44-501(a).

facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>4</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.<sup>5</sup> The claimant's testimony alone is sufficient evidence of her physical condition.<sup>6</sup>

In this instance, claimant was suffering from two injuries. The first, a right rotator cuff tear and impingement syndrome, was the primary focus of her initial treatment. But claimant testified that as she was receiving treatment she also complained about her neck pain and there was some uncertainty whether the shoulder problem was causing the neck pain. And, as noted by the ALJ, the doctor's contemporaneous medical records do contain occasional mention of neck pain. Moreover, Dr. Griffith's report indicates that claimant's conservative treatment included therapy with cervical traction.<sup>7</sup> After her shoulder surgery claimant's neck pain persisted and led to further diagnostic testing which confirmed her cervical problems.

The ALJ noted the medical evidence was somewhat contradictory and inconclusive but the claimant's testimony that she developed right sided neck pain while working at Zupreem established she suffered a work-related injury to her neck. This Board Member agrees and affirms.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>8</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>9</sup>

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<sup>4</sup> K.S.A. 2006 Supp. 44-508(g).

<sup>5</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991), *rev. denied* 249 Kan. 778.

<sup>6</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).

<sup>7</sup> P.H. Trans., Cl. Ex. 2.

<sup>8</sup> K.S.A. 44-534a.

<sup>9</sup> K.S.A. 2006 Supp. 44-555c(k).

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated February 8, 2007, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March 2007.

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BOARD MEMBER

c: Donald T. Taylor, Attorney for Claimant  
Elizabeth R. Dotson, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge